

### REMARKS

Applicant has amended claims 1, 2 and 4-7. Claims 8-23 have been withdrawn. These amendments have been made to place them in better form for examination and to further obviate the 35 U.S.C. §§102, 103 and 112 rejections as set forth in the Office Action dated June 10, 2003. It is believed none of these amendments constitute new matter. It is submitted that these amendments obviate the rejections. Withdrawal of these rejections are requested.

Applicant acknowledges Examiner's objection to the disclosure for the blank line on page 15, line 3. Applicant has deleted the paragraph on page 15. Withdrawal of this objection is requested.

The Examiner has rejected claims 1-7 under 35 U.S.C. §112, second paragraph as being indefinite. Applicant has amended claim 1. In claim 3, line 1, the "said diploid short vine pollinator plant" refers back to claim 1 a), line 1 ("... and diploid short vine pollinator plants ..."). Claims 4-7 have been amended. Accordingly, withdrawal of this rejection is requested.

The Examiner has rejected claims 1-7 under 35 U.S.C. §102(e) as being anticipated by Elmstrom (US Patent 6,355,865). Applicant submits that the pollinator (pollenizer) plants of the instant invention are marketable and harvestable, as described on page 11 [0055] and page 12 [0061], whereas the Elmstrom Patent 6,355,865 has non-marketable pollenizer plants which are not harvested. Accordingly, withdrawal of this rejection is respectfully requested.

The Examiner has rejected claims 1-2 and 7 under 35 U.S.C. §102(b) as being anticipated by Henderson (1997, J. Amer Soc. Hort. Sci. 102:293-297). Applicant submits that 'Sugar Baby' and 'Florida Giant' cultivars in the Henderson reference are long vine varieties which are different than the short vine pollinators of the instant invention. Accordingly, withdrawal of this rejection is respectfully requested.

The Examiner has rejected claims 1-4 and 7 under 35 U.S.C. §103(a) as being unpatentable over Maynard et al. (1992), Acta Hort. 318:169-173) in view of Crall et al. (1987, Proc. Fla. State Hort. Soc. 100:251-253), taken with the evidence of the instant

specification. Applicant submits Maynard discusses the production of triploid watermelons, but does not disclose the use of short vine pollinators. Crall et al. do not mention triploids at all, in fact, they compare the performance of F1 hybrids with open pollinated varieties.

It is well established law that both the suggestion and a reasonable expectation of success must be founded in the prior art, not in the Applicant's disclosure. *In re Dow Chemical*, 5 USPQ 1529, 1531 (Fed. Cir. 1988). *In re O'Farrell*, 7 USPQ2d 1673, 1681 (Fed. Cir. 1988). Applicant submits that the cited reference does not teach or suggest the claimed invention and that the Examiner has used an impermissible "obvious to try" standard in reaching the conclusion that Applicant's invention is obvious. *In re O'Farrell*, *supra*.

The references cited by the Examiner do not disclose or suggest using short vine pollinators to produce seedless watermelons. Therefore, there is no *prima facie* case of obviousness.

The determination of obviousness cannot be made without consideration of the Applicant's invention as a whole. As the Federal Circuit has stated,

... at all costs, the mistake of picking random bits of various prior art references and employing them as a "mosaic to recreate a facsimile of the claimed invention" must be avoided.

*W. L. Gore and Assoc. V. Garlock, Inc.*, 220 USPQ 303, 311 (Fed. Cir. 1983), citations omitted.

Applicant submits that the Examiner has randomly picked bits of prior art references using the hindsight provided by Applicant's disclosure.

A determination of obviousness cannot be made without consideration of the particular problems faced by the inventor. As stated by the Court of Customs and Patent Appeals,

[v]iewed after the event, appellant's invention may appear to be simple and as such obvious to those of ordinary skills in this art. This, however, is not a basis upon which to reject the claims. Where the invention of which a patent is sought solves a problem which persisted in the art, we must look to the problem as well

as to its solution if we are to properly appraise what was done and to evaluate it against what would be obvious to one having ordinary skills in the art.

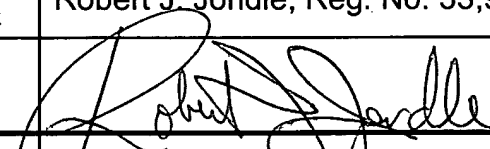
*In re Rothermel and Waddel*, 125 USPQ 328,332 (CCPA 1960).

In addition, the Federal Circuit has held that a determination of obviousness requires that there be a suggestion in the prior art that would lead a person of ordinary skill to the same solution of the problems facing the applicant. *Stratoflex v. Aeroquip*, 218 USPQ 871 (Fed. Cir. 1983).

In view of these facts, it is submitted that the Examiner's imputed conclusion of obviousness could only have been reached with the benefit of the hindsight application of the teachings of the present specification. As a result, it is respectfully submitted that these rejections be withdrawn.

The Examiner has rejected claim 2 under 35 U.S.C. §102(b) as anticipated by or, in the alternative, under 35 U.S.C. §103(a) as obvious over Parsons et al. (1992, Seedless watermelon production, Texas Agri. Ext. Serv. Bull. L-2303, Texas A&M, College Station). Applicant submits Parsons is a very brief one page summary of seedless watermelon production. Parsons does not disclose or suggest using diploid short vine pollinators to produce triploid fruit. Accordingly, withdrawal of this rejection is requested.

In view of the above amendments and remarks, it is submitted that the claim satisfies the provisions of 35 U.S.C. §§102, 103 and 112 and is not obvious over the prior art. Reconsideration of this application and early notice of allowance is requested.

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